

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MARCEL HARPER,

Petitioner,

v.

DAVID EBBERT,

Defendant.

CIVIL ACTION NO. 3:16-CV-419

(Judge Kosik)

**FILED
SCRANTON**

MAY - 3 2016

ORDER

PER  DEPUTY CLERK

AND NOW, THIS 3rd DAY OF MAY, 2016, IT APPEARING TO THE COURT
THAT:

[1] Petitioner, Marcel Harper, a prisoner confined at the United States Penitentiary in Lewisburg, Pennsylvania ("USP-Lewisburg"), filed a Petition for Writ of Habeas Corpus (Doc. 1), on March 9, 2016;

[2] The action was referred to Magistrate Judge Martin C. Carlson for Report and Recommendation;

[3] On March 15, 2016, the Magistrate Judge issued a Report and Recommendation, recommending that the petition be either dismissed without prejudice or transferred to the Eastern District of Pennsylvania, to be addressed as a petition under 28 U.S.C. § 2255, or to the United States Court of Appeals for the Third Circuit, to be addressed as a second and successive petition under § 2255 (Doc. 5);

[4] Specifically, the Magistrate Judge found that summary dismissal was appropriate, because Petitioner did not bring the matter appropriately to the Court, as it should be addressed by the sentencing court under § 2255. The Magistrate Judge found that Petitioner's reliance on Alleyne v. United States, 133 S. Ct. 2151, 2162 (2013), misplaced, as Alleyne does not allow for bypassing the requirements of § 2255;

[5] On March 25, 2016, Petitioner filed timely objections to the Magistrate Judge's Report and Recommendation (Doc. 6). Petitioner objected to the Magistrate Judge's finding that the petition should be transferred to the sentencing court as a petition under 28 U.S.C. § 2255;

[6] On April 15, 2016, Petitioner filed a Motion to Supplement the record (Doc. 7);

AND, IT FURTHER APPEARING THAT:

[7] When objections are filed to a Report and Recommendation of a Magistrate Judge, we must make a *de novo* determination of those portions of the report to which objections are made. 28 U.S.C. § 636(b)(1); see also Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In doing so, we may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. § 636(b)(1); Local Rule 72.31. Although our review is *de novo*, we are permitted to rely upon the Magistrate Judge's proposed recommendations to the extent we, in the exercise of sound discretion, deem proper. See United States v. Raddatz, 447 U.S. 667, 676 (1980); see also Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); and

[8] We have considered the Magistrate Judge's Report and Petitioner's objections. Upon screening the petition, we agree that a petition under § 2255 would be more appropriate to challenge his conviction and sentence. We also agree with the Magistrate Judge and find that the narrow exception set forth in In re Dorsainvil, 119 F.3d 245, 249 (3d Cir. 1997), was not met. Therefore, we will adopt the Magistrate Judge's recommendation.

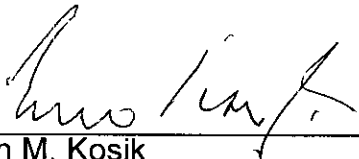
ACCORDINGLY, IT IS HEREBY ORDERED THAT:

[1] The Report and Recommendation of Magistrate Judge Martin C. Carlson dated March 15, 2016 (Doc. 5) is **ADOPTED**;

[2] The Clerk of Court is directed to **TRANSFER** the petition (Doc. 1) to the Eastern District of Pennsylvania as a petition under 28 U.S.C. § 2255;

[3] The Clerk of Court is directed to also **TRANSFER** Petitioner's Motion to Supplement (Doc. 7) to the Eastern District of Pennsylvania; and

[4] The Clerk of Court is directed to **CLOSE** this case.



Edwin M. Kosik
United States District Judge